SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 6

DE LAVAL STEAM TURBINE COMPANY,
PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR RECONSIDERATION AND MODIFICATION OF JUDGMENT IN PART.

Now comes Petitioner, De Laval Steam Turbine Company, and respectfully petitions this honorable Court to review its judgment of affirmance entered herein on the 23d day of November, 1931, for manifest error which appears on face of the record viewed in the light of the principles declared to be both applicable and controlling in the opinion of this Court.

Petitioner accepts without reservation the principles

of decision stated in *Russell Co.* v. *United States*, 261 U. S. 514, as now explained and applied by this honorable Court in the instant case. Conceding that defendant United States validly exercised its statutory power of cancellation to the extent indicated by the several stop-work orders; that cancellations so effected constitute but an exercise of the power of eminent domain, and that the liability of the government growing out of such exercise is for "just compensation" which does not include any allowance for or on account of "anticipated profits" as such, but only such a sum, "as considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimants rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy," nevertheless it is respectfully contended that the "Balance due at time of cancellation of (Standifer) contract," stated in Finding of Fact 15 (R. 88) as $71,834.77, should have been $103,622.74, as will readily appear upon consideration of Findings of Fact numbered 10, 14 and 15 (R. 85, 87 and 88) in their entirety, in connection with applicable portions of the supplemental opinion of the Court of Claims as same appears in the Record at pages 101, bottom, to 103, inclusive.

It is to effect inclusion in the judgment of the difference of $31,787.97, with allowable interest thereon, as due to petitioner upon the face of the record, that this petition for reconsideration is brought and most respectfully submitted.

STATEMENT.

This petition concerns itself solely and only with the costs and expenditures and credit items pertaining to the Standifer contract, as stated in Finding 15, (R. 88); the things done by the several parties, including the defendant here, with respect thereto and the Findings of the Court below ostensibly based thereon.

The so-called Standifer contract, being United States Shipping Board E. F. C. contract number 5006 (R. 81) for construction of certain turbine equipment for ships, was attached to the petition as filed in the Court of Claims, marked "Exhibit B-1" (R. 39-50) and is made part of Finding 2, by reference (R. 80, 82).

By its terms the De Laval Steam Turbine Company bound itself to furnish the purchaser (originally G. M. Standifer Construction Corporation, but later, by requisition and substitution, the United States of America):

"Ten (10) 3,000-H. P. geared turbines" * * * (R. 40) at total price of Seven Hundred and Thirty-five Thousand Dollars ($735,000); terms of payment and shipment as follows:

> "Price: The price of the said machinery is Seven Hundred Thirty-five Thousand Dollars ($735,000).
>
> "Ten per cent of contract price with signed contract; seventy per cent when shipped; ten per cent thirty days after shipment; ten per cent sixty days after shipment.

> "Shipment: The first unit covered hereby is to be shipped about January 15, 1919, and the order completed about July 1, 1919, provided the construction of the hulls of the vessels in which these sets are to be installed progresses at a rate to require starting and completion of shipments within the time specified. * * *" (R. 42.)

It is also provided therein that

> *"If part of the machinery is to be shipped in advance of all of it, or may be so shipped by direction of the purchaser or with the purchaser's approval, proportionate settlement shall be made therefor in accordance with the specified terms; and if shipment or any other act or condition affecting payment for the machinery or any part thereof shall be delayed on account of the purchaser, payment therefor shall become due as if shipment had been made.* * * *" (R. 41.)*

This "Standifer contract" was not canceled in entirety either in fact or within purview of the Act of June 15, 1917, c. 29, 40 Stats. 182, 183, nor did the Fleet Corporation at any time order petitioner to stop work thereunder other than with respect to nine of the ten turbine units contracted for.

As expressly found in Finding 14 (R. 87):

> "On February 19, 1919, defendant (The United States acting through Emergency Fleet Corporation) directed plaintiff (petitioner here) to stop work on four of said Standifer

*Italics supplied.

turbines, but to proceed on the remaining six; on April 14, 1919, the Fleet Corporation directed plaintiff to stop work on five more of said Standifer turbines, but to proceed on the tenth."

And in Finding 10, second paragraph, it is expressly found as fact that

> "As alleged in the petition, plaintiff (petitioner here) completed and delivered to defendant certain of said turbine equipment under the said Standifer contract, and was paid therefor the sum of $78,220 'in accordance with said Standifer contract.' This sum was paid in the following manner: The Fleet Corporation paid plaintiff (petitioner) $1,700 on account of two pumps having been completed and delivered to it by plaintiff on the Standifer contract; also paid plaintiff in three installments $64,620 on account of a geared marine turbine having been completed and delivered under the Standifer contract; and $11,900 on account of fourteen other pumps having been completed and delivered under the Standifer contract." (R. 85.)

Petitioner asserted and argued in the court below and reiterates here that the Standifer contract was not at any time canceled in its entirety but only in part. The partial cancellation thereof evidenced by the two stop-work orders of February 19 and April 14, 1919, extended but to nine of the ten turbine units contracted for. As expressly required by the second of said orders, the contract was kept alive for the benefit of the government to the extent of the remaining

or tenth turbine unit, which was completed and delivered as required by the defendant.

As stated in this Court's opinion:

> "The government requisitioned the purchasers' rights in the contracts, not for the purpose of putting an end to the contracts, but of keeping them alive for the benefit of the government * * *. The effect was the same as though the contracts had been assigned by the purchasers with the consent of the manufacturer. There resulted, by operation of law, a substitution of purchasers, and the government became possessed of the right to enforce the contracts as though it had been an original contracting party. In effect, the old contracts became new contracts between the government and the petitioner."

Effecting substitution of purchases was not all, for, by virtue of the statute which authorized the requisition and consequent substitution, there was injected into the situation an alternative power on part of the substituted purchaser to either enforce performance in whole or in part or to annul or cancel the contract either in whole or in part.

As found (Finding 14) by the Court of Claims, the substituted purchaser (Emergency Fleet Corporation), elected by its order of February 19th, to require petitioner "to stop work"; in other words, to "cancel" as to "four of said Standifer turbines," but expressly directed petitioner "to proceed on the remaining six."

Can it reasonably be doubted that such an order, couched in such double aspect, continued the contract

in its every provision in full force to the extent of six (6) of the ten (10) units primarily contracted for, —in other words, kept it alive to that extent for the benefit of the government?

And when, later, i. e., on April 14, 1919, by similar order the Fleet Corporation again directed petitioner "to stop work on five (5) more of said Standifer turbines, but to proceed on the tenth" (R. 87), is it any the less certain and true that in every provision, save only as to the number of units required, the contract was kept alive for the benefit of the government as to the final and tenth unit?

The Court of Claims, over petitioner's insistence to the contrary, held the Standifer contract to be indivisible (R. 101) and consequently that the payments made for the tenth turbine and sixteen pumps completed and delivered were not payments for those specific articles but were payments on account of the entire contract. In its calculation of the balance due for actual costs and expenditures, it treated the whole contract as cancelled and included not only the costs and expenditures with respect to the nine turbines on which work was stopped but also the cost to plaintiff of one turbine and fourteen other pumps completed and delivered to defendant, and credited the latter with: (*a*) the entire $73,500 paid by Standifer on account of the whole contract price without applying any part thereof to the uncancelled tenth of the contract and (*b*) with the several amounts paid for or on account of the specific articles manufactured and delivered as to which there was no cancellation. This calculation is shown in

Finding 15, the pertinent portion of which reads as follows:

"15. The actual costs and expenditures and the credits to which defendant is entitled thereon are upon the several contracts as follows:

* * * * * * *

Standifer Contract

Actual costs and expenditures (Finding 10)		$223,554.77
Credit by Standifer payment (Finding 2)	$73,500.00	
Credit by Fleet Corporation payments (Finding 10)	78,220.00	151,720.00
Balance due at time of cancellation of contract,		$71,834.77

* * * * * * *"

The item of $223,554.77 shown in above finding is composed of the following items as stated in Finding 10:

"Plaintiff's actual costs and expeditures incurred in and about performance of the Standifer contract up to times defendant directed it to stop work thereon were $169,772.74 with respect to the nine turbines on which work was stopped pursuant to said orders"	$169,772.74
"Cost to plaintiff of one turbine and 14 other pumps manufactured and delivered to defendant under the Standifer contract was	53,782.03"
	$223,554.77

In the court below petitioner contended that as against the item of $169,772.74 costs and expenditures just mentioned, the defendant was entitled to credit for but nine-tenths of the total cash payment made by the Standifer Corporation, viz, $66,150, and that the remaining one-tenth thereof and the $78,220 paid to petitioner by the Fleet Corporation for work completed and delivered under and in accordance with so much of the contract as remained uncanceled, did not constitute and should not be given status of credits against such "cost and expenditures", in any aspect.

Rejecting such contention the learned court below asserted that "the Standifer contract was indivisible"; that "Plaintiff's counsel make their calculation under a theory by which the payments made on the Standifer contract are held to be payments for the articles completed," and said in such connection

> "• • • This is a mistake. The contract specified one price for all the machinery to be constructed under it. Both the turbines and the pumps were constructed under the contract and included in it, and the payments were made on the contract. With reference to payments, the contract provided, 'Ten per cent of contract price with signed contract; seventy per cent when shipped; ten per cent thirty days after shipment; ten per cent sixty days after shipment."
>
> "It will be observed that ten per cent on the whole contract price on all the machinery contracted for was paid in advance. The amount of this payment was $73,500 as shown by Finding 2. When two pumps were completed under the contract the Fleet Corporation paid plaintiff

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GEORGE C. HOLTON,
FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
Counsel for Petitioner.

It is most respectfully submitted holding the Standifer contract to be indivisible and crediting against costs and expenditures amounts already paid by defendant to petitioner for items completely manufactured and delivered under uncancelled tenth of the contract and in compliance with defendant's orders and requirements, constitutes error of law apparent on the face of the record, which calls for rectification. The consequences of such error, equally apparent on face of the record, should and readily can be corrected and to the extent necessary to effect such correction the general order of affirmance entered herein should be modified.

Respectfully submitted,

GEORGE C. HOLTON,
FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, George C. Holton, of counsel for Petitioner, am well informed as to the statements and suggestions made in the foregoing Petition for Rehearing, and do hereby certify that said petition is both made and presented in good faith and not in any aspect for purposes of delay.

GEORGE C. HOLTON.

We concur in above certificate of counsel.

FREDERIC D. McKINNEY,
JOHN SPALDING FLANNERY,
Of Counsel for Petitioner.